(3)

Supreme Court, U.S.
FILED
JUN 9 1992
OFFICE OF THE CLERK

No. 91-1780

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

THE STATE OF COLORADO,
Petitioner,
vs.
JOHN HARVEY GASKINS,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

On Certiorari to the Colorado Supreme Court
Case No. 90SC437

GALE A. NORTON*
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
JOHN DANIEL DAILEY
Deputy Attorney General
ROBERT MARK RUSSEL
First Assistant Attorney General
Appellate Section
Attorneys for Petitioner
110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4540
***Counsel of Record**

7

TABLE OF CONTENTS

PAGE

ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

CASES **PAGE**

Alvarez v. People, 797 P.2d 37 (Colo. 1990) 2

Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680 (1991) 2

Hutto v. Davis, 454 U.S. 370 (1982) 2

People v. Drake, 785 P.2d 1257 (Colo. 1990) 2

People v. Hernandez, 686 P.2d 1325 (Colo. 1984) 2

Rummel v. Estelle, 445 U.S. 263 (1980) 2

Solem v. Helm, 463 U.S. 277 (1983) 2

No. 91-1780

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

THE STATE OF COLORADO,
Petitioner,
vs.
JOHN HARVEY GASKINS,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

On Certiorari to the Colorado Supreme Court
Case No. 90SC437

ARGUMENT

Although respondent Gaskins does not dispute that his case was decided on federal grounds, he argues that certiorari should be denied because Colorado Supreme Court decisions have put the State "on notice" for eight years that full proportionality reviews could be necessary (brief in opposition, pp. 7-8). This argument should be rejected for two reasons.

First, irrespective of whether Colorado "was on notice" that a full proportionality review might be ordered someday, no such reviews have been ordered until now. Thus, *Gaskins* represents an important departure from earlier Colorado Supreme Court decisions construing the eighth amendment. Those decisions rejected eighth amendment proportionality challenges upon a mere review of the type of offense committed and the sentence imposed.

See Alvarez v. People, 797 P.2d 37 (Colo. 1990); *People v. Drake*, 785 P.2d 1257 (Colo. 1990); *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984). Unlike *Gaskins*, those decisions recognize that the availability of parole should weigh heavily. *See Hernandez*, 686 P.2d at 1330 n.4 ("*Rummel* can only be distinguished from *Solem* by emphasizing the provision in the South Dakota statute which denies criminals the possibility of parole").

Second, it is unimportant whether Colorado was "on notice." It is not necessary for the party seeking certiorari to demonstrate surprise or unforseeability. It should be enough that the decision below was incorrect as a matter of federal constitutional law and is of broad importance and interest. *Gaskins* is such a decision, presenting an excellent vehicle for this Court to clear up much of the confusion that has arisen from the tension between *Rummel v. Estelle*, 445 U.S. 263 (1980), and *Solem v. Helm*, 463 U.S. 277 (1983).

Ultimately, the parties in this case simply disagree about the nature and extent of the eighth amendment proportionality guarantee. Respondent Gaskins believes in a broad proportionality guarantee. He claims that his sentence cannot be ruled constitutional under this guarantee unless a court examines the facts underlying each of his offenses and compares his sentence with other sentences imposed in Colorado and other jurisdictions.

Colorado believes that the proportionality guarantee is a narrow one. Its view reflects the separation of powers principles applied by the majorities in *Rummel* and *Hutto v. Davis, 454 U.S. 370 (1982)*, and by the plurality in *Harmelin v. Michigan*, ___ U.S. ___, 111 S.Ct. 2680 (1991). Under Colorado's view, Gaskins's sentence can and should be ruled constitutional without any further examination. A threshold comparison suffices: Gaskins' life sentence was imposed for his *fourth* felony conviction; his convictions were all for crimes traditionally and properly classifiable and punishable as felonies; one of his prior convictions was for a

violent offense (second degree assault on a police officer); and his life sentence includes the possibility of parole.

As demonstrated by this case (and decisions cited by both sides), there is broad disagreement about an important area of federal constitutional law. This Court should address the questions presented by this case and decide which view is correct.

CONCLUSION

This Court should grant Colorado's petition for certiorari.

GALE A. NORTON*
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

ROBERT MARK RUSSEL
First Assistant Attorney General
Appellate Section

Attorneys for Petitioner

110 Sixteenth Street, 10th Floor
Denver, Colorado 80202
Telephone: 620-4540
*Counsel of Record